

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

C.A. NUMBER: 05-11401-MLW

SENECA INSURANCE COMPANY
As Subrogee of Surfside Condominium
Association,

Plaintiff,

v.

BROAN-NUTONE LLC,

Defendant.

**AFFIDAVIT OF ELIOT DUNCAN IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

Eliot Duncan, being duly sworn, deposes and states the following:

1. I am the Vice President of Product Safety at Broan-NuTone LLC, located at 926 West State Street, Hartford, WI 53027-0140.

2. A fire occurred at the Surfside Condominium Association in West Yarmouth, MA, on December 15, 2003. The fire was alleged to have started in a Broan-NuTone bathroom fan.

3. Upon information and belief, the fire scene was dismantled by Whalen Restoration, and they completed their work by April 2004.

4. The first notice of the fire that was given to Broan-NuTone was sent on January 10, 2005, thirteen months after the fire occurred. A true and accurate copy of that notice is attached as Exhibit A. By this time, Whalen Restoration had reclaimed the scene, and the wiring, circuit breakers and switches were thrown out.

5. Broan-NuTone was clearly prejudiced by the late notice given by the plaintiff-insurer. The total destruction of the fire scene, prior to notifying Broan-NuTone of the fire, prevented Broan-NuTone from conducting any investigation into the fire burn patterns, the wiring, the switches, potential causes of the fire, and any other evidence that would assist in its defense of the claim. Broan-NuTone was denied the opportunity to personally inspect the fire scene and seek alternative causes of the fire.

6. Moreoever, because of the plaintiff's failure to preserve adequately evidence from the fire scene, including wiring and switches, and the failure to trace the electrical wiring, Broan-NuTone is not in a position to conduct a proper cause and origin investigation that may determine the real cause of the fire.

7. Furthermore, because of the plaintiff's failure to timely notify Broan-NuTone of the fire, Broan-NuTone was denied the opportunity to interview witnesses from Colonial Candle, the tenant that occupied the premises at the time of the fire, within a reasonable time after the fire occurred.

8. Upon information and belief, the very fan that was thought to be the cause of the fire was not adequately preserved. It was placed in a box and sat on the floor during the destruction and renovation of the fire scene. Discovery has revealed that no steps were taken by the plaintiff-insurer to ensure that the fan was not altered in any way during the seven months that it sat on the floor at the scene of the fire. Because of this failure, there is no way for Broan-NuTone to determine whether the fan that is now available is actually in the same condition that it was immediately after the fire.

SIGNED UNDER THE PENALTIES OF PERJURY ON THIS THE 2nd DAY
OF FEBRUARY 2007.

Eliot Duncan

Eliot Duncan
Vice President of Product Safety
Broan-NuTone LLC
926 West State Street
Hartford, WI 53027-0140

EXHIBIT A

*Recd 11/14/05*

160 WATER ST., NEW YORK, NY 10038
(212) 344-3000

Broan - NuTune LLC
P.O. Box 140
Hartford, WI 53027

January 10, 2005

Re: Our Insured: Surfside Condo
Our Claim #: 3LLN065
Our Policy #: CMP 200 10 17
D.O.L. 07/15/05 5/4 12/15/03
Amount: \$194,763.00

To Whom It May Concern,

We've completed our investigation into the above loss. It's been determined that your company is liable for this fire. Enclosed is the necessary documentation to support our claim.

We paid our insured over \$194,000.00 due to the defect and malfunction of your exhaust fan. Please forward the enclosed documentation to your insurance carrier immediately, to avoid being denied for late notice. We're looking for 100% reimbursement.

If you have any questions I can be reached at (212) 277-3528.

Very truly yours,

A handwritten signature in black ink, appearing to read "G.S. Polsky".
Greg S. Polsky
Subrogation Collections Mgr.

*1/17/05
Greg Polsky called
indicated it appears to
be a Broan model 657
vintage fan.
KJW*

FAX LINES
